Supreme Court, U.S.
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No. 82-872
IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM JOSEPH LEGNER,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented

1. Must a plaintiff in an Age Discrimination in Employment Act case offer credible and sufficient evidence that an employer's legitimate, non-discriminatory motive was a mere pretext for age discrimination in order to avoid a directed verdict after presentation of plaintiff's case?

2. When an employee's position is being abolished for a legitimate, non-discriminatory business purpose and the employee refuses the only other available job opening within his qualifications, must a court take into consideration positions opening after the employee's refusal and termination in ruling on a motion for directed verdict after plaintiff's case in chief?

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Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent Union Pacific Railroad Company[1] opposes the granting of the Petition for Writ of Certiorari in this case.

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[1] Respondent Union Pacific Railroad Company is a wholly-owned subsidiary of Pacific Rail System, Inc., which is a wholly-owned subsidiary of Union Pacific Corporation. Respondent has a number of subsidiaries and affiliates which are wholly owned. The only subsidiaries and affiliates which are owned in part by others are: Alameda Belt Line; Alton & Southern Railway Company; Brownsville & Matamoros Bridge Co.; Camas Prairie Railroad Company; Galveston, Houston and Henderson Railroad Co.; Houston Belt & Terminal Railway Co.; Jefferson Southwestern Railroad Co.; Missouri Pacific Corporation; Oakland Terminal Railway; Portland Traction Company; Southern Illinois and Missouri Bridge Co.; St. Joseph Terminal Railway Company; The Ogden Union Railway & Depot Company; The Weatherford Mineral Wells and Northwestern; The Western Pacific Railroad Company; UINTA Development Corporation; Union Pacific Resources Ltd.; and The Saint Joseph & Grand Island Railway Company.

STATEMENT OF CASE.

Petitioner filed this case in the United States District Court for the Northern District of California alleging that Respondent Union Pacific Railroad Company (Union Pacific) had violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq*. The Honorable Alfonso J. Zirpoli presided over the jury trial which began in San Francisco on February 4, 1980. At the conclusion of Petitioner's case, Union Pacific moved for a directed verdict on the basis of the evidence presented, trial briefs and oral argument. The motion was granted. The District Court's Findings of Fact and Conclusions of Law are attached as Appendix B to the Petition for Writ of Certiorari.

The evidence at trial revealed that Petitioner was a non-union employee of Union Pacific Railroad Company for approximately 19 years. He held several clerical positions with the title of clerk or clerk/stenographer while performing the duties of stenographer, accounting clerk and statistical clerk. Petitioner then became a ticket agent responsible for planning tours for passengers. Subsequent promotion to Assistant City Ticket Agent and City Ticket Agent included responsibilities for preparing passenger and freight accounting information and supervising employees doing the same type of work.

Passenger service by Union Pacific was abolished in 1970. After the concomitant abolishment of Petitioner's job as City Ticket Agent, he continued to perform freight accounting functions for the Traffic Department. His title was changed to Assistant Chief Clerk to Traffic Manager. This did not represent a promotion. Petitioner continued to perform clerical accounting functions and did not act as an assistant to the Chief Clerk. Petitioner's salary was less than that of four union clerical jobs in the office. Petitioner held

the position of Assistant Chief Clerk to Traffic Manager from January 1, 1971 through June 30, 1976.

A clerk/stenographer, Brent Borrowman, who had been employed at Union Pacific since 1968 was assigned to assist in performing the freight accounting functions for Northern California in 1973. Mr. Borrowman testified that in 1976 he was spending approximately half of his time performing freight accounting functions and the remainder of his time doing other reports and clerical tasks in the Traffic Manager's office. Although Mr. Borrowman was assisting in the performance of freight accounting work, Petitioner had no authority or control over Mr. Borrowman's employment. In fact, Mr. Borrowman was a union employee whose salary exceeded that of Petitioner.

Petitioner did not claim that Union Pacific discriminated against him in any way from the time of his initial employment in 1957 until 1976. Petitioner admitted that the accounting functions which he was performing were transferred to Los Angeles for a valid business reason and he did not claim that this decision was in any way made to get rid of him.

The transfer of the accounting functions to Los Angeles began during the first week of July, 1976 and was completed as of July 23, 1976. Petitioner took four weeks of vacation in June, 1976. During that period of time, and while the accounting functions were being transferred to Los Angeles during the first three weeks of July, Mr. Borrowman performed the freight accounting functions necessary in addition to his other office duties. As a partial result of the decision to transfer the freight accounting functions to Los Angeles Mr. Borrowman's union position was also abolished and he was assigned to another clerk/stenographer position effective August 1, 1976.

Petitioner was first advised in April, 1976 that the accounting functions would be transferred to Los Angeles and his job would be abolished. Alternative job opportunities in union clerical jobs in the Bay area were discussed with him. Basically he was given his choice of those jobs but did not want to displace anyone. No other non-union clerical jobs were available in the Northern California area from April to June, 1976. Petitioner's supervisor was not aware of another available non-union clerical job in Northern California until July 23 or 24, 1976 after Petitioner was no longer employed by the company.

At Union Pacific, non-union employees are rated on an evaluation Form 2900 as either 1-outstanding; 2-superior; 3-fully competent; 4-generally adequate; or 5-marginal or no rating. Within the Traffic Department promotions are given to No. 1 or No. 2 rated people. Petitioner's overall performance appraisal rating was 3-fully competent.

While Petitioner was on vacation in June, 1976 he received a letter officially notifying him that his position as Assistant Chief Clerk to Traffic Manager was being abolished June 30, 1976 and was offered the available position as clerk/stenographer in Oakland. Petitioner had previously expressed a desire to remain in the Bay area. Petitioner did not respond to the letter. In response to a telephone call on July 1 from his superior, Petitioner advised that he was not interested in the Oakland job. Because Petitioner's job was being abolished and because of his refusal to accept the only other available non-union clerical job, he was terminated effective July 1, 1976. Petitioner did not protest the termination of his employment orally or in writing.

At trial Petitioner admitted that the decision to install a lock-box system and to abolish his job in San Francisco was made for a valid business reason and was not the result of any discriminatory motive. Petitioner's only claim of age

discrimination was in regard to personnel decisions made by Union Pacific Traffic Department management after the abolishment of Petitioner's position was known. At the time of trial Petitioner agreed that he had no direct evidence of any discriminatory action in violation of the Age Discrimination in Employment Act.

In ruling on the Motion for Directed Verdict the District Court found that the indirect and circumstantial evidence presented was not susceptible to a reasonable inference that there was at the time of Petitioner's termination any position which was available and for which Petitioner was qualified. The District Court further found that the evidence presented was not susceptible to a reasonable inference that age played any determining factor in the employment decisions of the Union Pacific with regard to Petitioner. (Appendix D to Petition, p. A-8, paragraphs 4 & 5).

In subsequently ruling on a Motion for New Trial and to Amend Findings of Fact and Conclusions of Law, the District Court reviewed its decision and found that it had applied the proper standard of proof and had viewed the evidence in the light most favorable to Petitioner. (Appendix E to Petition, p. A-10) The motions were denied and the case was taken on appeal by Petitioner to the Ninth Circuit Court of Appeals. There, after full briefing and oral arguments, the Ninth Circuit Court of Appeals affirmed the trial court's decision and subsequently denied a Petition for Rehearing. (Appendices A & B to Petition, pp. A1-A5).

ARGUMENT.

I.

The Court Below Used the Appropriate Standard of Review and Correctly Applied That Standard in Approving the Motion for Directed Verdict.

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* was enacted in 1967 for the express purpose of promoting "employment of older persons based on their ability rather than age" and prohibiting "arbitrary age discrimination". 29 U.S.C. §621(b). The Act was never intended to be a panacea for all older workers terminated or not offered employment by an employer.

Petitioner seeks a writ of certiorari on the grounds that the Ninth Circuit Court of Appeals decision in this case is in conflict with the rulings of other circuit courts of appeal. Since Petitioner conceded that his position as Assistant Chief Clerk to Traffic Manager was abolished for legitimate business reasons and further conceded that he had no direct evidence of any age discrimination, the Ninth Circuit Court of Appeals accurately analyzed the evidence presented by Petitioner under the formula established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court has indicated that the *McDonnell Douglas* formula is flexible and can be modified to accommodate the particular case. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).

In affirming the District Court's directed verdict, the Ninth Circuit carefully delineated the elements of the formula it was using to analyze Petitioner's case.

> "Legner argues that the Railroad did illegally reject him for alternate positions available before July 1, 1976, when it: (1) allowed one Borrowman to take over some of Legner's former duties for several weeks

pending the complete abolition of those tasks; (2) refused to promote Legner to a position as Traffic Agent; and (3) failed to elevate Legner to the management training program. Legner may establish that these latter two actions by the Railroad supported a prima facie case of age discrimination by showing: (i) he belonged to the protected class; (ii) he applied and was qualified for an available position; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the Railroad continued to seek applicants from persons of his qualifications. *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978). Similarly, he may establish a prima facie case based on the use of the alleged substitute if he shows: (i) he was a member of the protected class; (ii) he was performing his job in a satisfactory manner; (iii) he was discharged; and (iv) the substitute was in fact a replacement who was a substantially younger employee with equal or inferior qualifications. *Douglas*, 656 F.2d 532-33. These standards are flexible and can be modified to accommodate the particular case. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979)." (Appendix A to Petition, pp. A-2 & A-3).

The formula used in this case was in substantial conformity with other Ninth Circuit decisions. *See, Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981) and *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981). This formula has also been similarly used in Age Discrimination in Employment Act cases by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979), the Sixth Circuit in *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (1975), the Eighth Circuit in *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958 (1978), and the Fifth Circuit in *Wilson v. Sealtest Foods Division of Kraftco. Corp.*, 501 F.2d 84 (1974).

Petitioner seems to argue that the right to jury trial in an age discrimination case, which is granted by 29 U.S.C. §626(c)(2) and was recognized in *Lorillard v. Pons*, 434 U.S. 575 (1978), eliminates the possibility of the trial court granting a directed verdict after the plaintiff's case in chief. However, contrary to Petitioner's argument, the circuit courts have uniformly agreed that a plaintiff must do two things before requiring the employer to present any evidence in response, (1) present a prima facie case of age discrimination and, (2) present evidence that any explanation proffered by Defendant is a mere pretext. *E.g., Loeb v. Textron Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1237 (5th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 412 (9th Cir 1981). These requirements conform to this Court's opinion in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). These elements were specifically required by the Ninth Circuit Court of Appeals in this case and found to be lacking.

> ". . . these (facts) were at most sufficient merely to establish a prima facie case, and we cannot state they were adequate even for that. Nevertheless, assuming this showing had been enough to maintain a prima facie case, the uncontradicted and overwhelming evidence that the railroad had a legitimate, non-discriminatory motive prevented a jury from finding that age discrimination was the determining factor in the railroad's action." (Court of Appeals Opinion, Appendix A to Petition, p. A-4).

This finding coincides with the Ninth Circuit's decision in *Douglas v. Anderson*, 656 F.2d 528 (1981) in which it found that the evidence that Plaintiff was discharged for a legitimate, non-discriminatory reason was overwhelming and completely undermined any inference of discrimination that

may have been raised through Plaintiff's circumstantial evidence. Further in that case, as in this, the Plaintiff did not produce substantial evidence in support of the claim that the former employer's action was merely a pretext for age discrimination.

The right to a jury trial in age discrimination cases does not eliminate the possibility of a motion for a directed verdict by the defendant at the conclusion of a plaintiff's case. There is no conflict among the Circuit Courts on this issue. The First Circuit specifically acknowledged the Plaintiff's responsibilities to present evidence to prove each element of the prima facie case and that Defendant's reason was a pretext in the case of *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1979).

> "Nor does use of *McDonnell Douglas*, as we understand it, pose any real, as opposed to theoretical, difficulty for disposing of motions for directed verdicts in jury trials. Normally the plaintiff will know ahead of trial what reason the defendant is relying on, and the usual order of trial, with plaintiff putting all of his evidence in first, will suffice. If defendant then moves for a directed verdict, the judge will be able to determine whether enough evidence has been introduced to allow the jury to find each disputed element of the prima facie case and that defendant's reason is a pretext. As the defendant's burden is not one of persuasion, *McDonnell Douglas* creates no impediment to ruling on this motion before the defendant has put on his defense."

The standard applied by the Ninth Circuit in this case is the same as that used by the First Circuit.

Petitioner argues that the Ninth Circuit's ruling is in conflict with the standards applied by the Fifth Circuit on motions for directed verdict. Discussing motions for directed

verdict in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) the Fifth Circuit stated:

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury." 411 F.2d at 374.

This standard of review was cited, approved and applied by the Fifth Circuit in the age discrimination case of *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (1981). There is no conflict in the standards used by the Fifth Circuit, the Ninth Circuit or any other circuit court of appeals in ruling on motions for directed verdicts in ADEA cases. Any difference in circuit court decision results, as it should, from applying the same standard to the different facts of the cases.

In this case Petitioner admitted that there was no direct evidence of age discrimination and that the abolishment of Petitioner's position with the railroad was for a legitimate, valid business reason. The only issue is whether there was enough circumstantial evidence presented by Petitioner at trial to make a prima facie showing of age discrimination and to show that Defendant's explanation of its actions was a mere pretext. Petitioner is really not seeking a clarification of conflicting standards among circuit courts but is asking for another attempt to argue that the Petitioner's case presented some evidence of age discrimination. Both the District Court and the Ninth Circuit Court of Appeals upon

reviewing the evidence found that Petitioner had not met that burden. There is no necessity for this Court to again review the factual evidence to confirm that finding.

II.

When Ruling on a Motion for Directed Verdict in an Age Discrimination Case for Failure to Promote, a Court Should Not Consider Alternate Positions Which Became Available After the Employee Was No Longer Employed and for Which He Made No Reemployment Application.

Petitioner argues that the Ninth Circuit's opinion excluding consideration of potential jobs for Petitioner which were not available at the time he refused to accept the new position offered him is in conflict with the decisions of other circuits. In support of this contention Petitioner cites three age discrimination cases: *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980); and *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043 (5th Cir. 1979). None of these cases evidences any contradiction among circuit courts which necessitates this Court's consideration.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the Court did discuss as a part of the facts the hiring of a person younger than the plaintiff five months after the plaintiff was terminated. But the issue in the case was whether the evidence supported the third requirement for a prima facie case under the *McDonnell Douglas* formula, *i.e.*, whether Plaintiff was replaced by a younger person. These facts were important because the plaintiff alleged that the same job, with a different title, was given to a younger employee after Plaintiff's termination. The evidence presented supported Plaintiff's prima facie case under the formula. There was no evidence or issue as to the availability

of positions for Plaintiff after termination. There is no conflict between the First Circuit's decision in *Loeb* and the Ninth Circuit opinion in this case.

Petitioner contends that the Fifth Circuit's decision in *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), is also in conflict with the Ninth Circuit opinion below. Petitioner notes that in *McCorstin*, the Court examined post-termination conduct by the employer to determine whether the employer's proffered explanation was pretext. But such a consideration is not in conflict with the Ninth Circuit's opinion in this case. In *McCorstin*, the only evidence of subsequent personnel actions was regarding the solicitation and hiring of college graduates to work in various engineering departments. McCorstin did not offer this evidence to prove that he should have been offered one of those jobs, but to show a general pattern of age discrimination. The case did not deal with any specific position which became available after Plaintiff's termination. There is no conflict in this holding when compared with the decision of the Court of Appeals below.

In the case of *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043 (5th Cir. 1979), three women aged 45, 32, and 47 applied for an executive secretary position. They were interviewed in that order and the job was offered to the 32-year-old before the 47-year-old was interviewed. Direct evidence was presented that showed the employer was discriminating on the basis of age. The 45-year-old was given an award of back pay. However, the 47-year-old's claim was denied and the denial affirmed by the Fifth Circuit because there was no job opening at the time she was interviewed. The position had already been given to the 32-year-old.

> ". . . it clearly appears that there was no job opening at the time of the interview and, of course, the position

> did not remain open because it had been previously filled.
>
> * * *
>
> The contention of the Government that this Court should order relief for Ms. Neshick even if no vacancy existed at the precise moment of application is erroneous." 595 F.2d at 1044.

The facts in the *Airpax* case are distinguishable from Petitioner's action. Significantly, in *Airpax* there was direct evidence of age discrimination. Also, *Airpax* was a failure to hire case, so a plaintiff could show that she should have been considered for subsequent openings for other positions. But the holding in *Airpax* directly supports the Ninth Circuit Court of Appeals decision below. If there was no position available at the time the discrimination is alleged to have taken place then a prima facie case under the ADEA, using the *McDonnell Douglas* formula, has not been presented.

As additional authority for his claim of conflicting circuit opinions, Petitioner cites the Title VII cases of *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1979) and *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70 (9th Cir. 1980). As Petitioner explains, in both of those cases the Court considered employment opportunities for a period of time after application for employment had been made. But the significant distinguishing factor in those cases is that they dealt with failure to hire claims. There is no evidence that Petitioner in this case reapplied for any position that subsequently became available at Union Pacific after he refused to accept the only available, reasonably comparable position at the time.

Failure to hire cases are markedly different from Petitioner's claim in this case. When a person files an application for employment it is expected that the person will be considered for positions available at the time of appli-

cation and for positions of similar qualifications for which the employer seeks personnel within a reasonable period after that time. The *McDonnell Douglas* formula encompasses that expectation. But Petitioner was not considered for subsequent positions because he was no longer an employee and had not made application or any other attempts to be reemployed by Union Pacific. In fact, he had expressed no interest whatsoever in other positions after he refused the clerk/stenographer job. He made no protest orally or in writing regarding his termination. Therefore, the only rational approach to Petitioner's claim was not to consider positions which became available after Petitioner was no longer employed. The Ninth Circuit was certainly justified in adopting this approach. Because of the factual differences, the ruling of the Court below in no way contradicts other circuit court decisions.

Petitioner argues that the purposes of the ADEA will not be met and that a jury as trier of fact will be deprived of relevant evidence in determining age discrimination by application of the approach used by the Court of Appeals below. But that decision does not render a ruling on the admissibility of evidence of an employer's conduct on the issue of pretext. All it does is require that a plaintiff prove a prima facie case of discrimination on the basis of age as to some position or employment benefit available at the time when the discrimination is alleged to have taken place. Such a holding is necessary and proper and does not conflict with other decisions.

Petitioner cites the cases of *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980); *Jacobs v. Martin Sweet Co., Inc.*, 550 F.2d 364 (6th Cir. 1978); *Rosada v. Santiago*, 562 F.2d 114 (1st Cir. 1979); *Bertrand v. Orkin Exterminating Co.*, 454 F.Supp. 78 (N.D.Ill. 1978); and *Coates v. National Cash Register*, 433 F.Supp.

655 (W.D.Vir. 1977) as being in conflict with the Court of Appeals decision below. However, review of those cases shows dissimilar facts and none of those cases contains legal holdings which conflict with the rulings in this case. Petitioner has not shown any direct conflict between the opinions below and other decisions of circuit courts. If anything, the cases dealing with ADEA actions, such as *Marshall v. Airpax*, support the rulings in this case. There is no reason for this Court to review this case.

CONCLUSION.

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Dated: January 10, 1983.

Respectfully submitted,

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